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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

AARON SMITH TRUCKING COMPANY, INCORPORATED
and
WILLIAM WELLS,

Petitioners,

V.

KENNETH C. KING,
by his Guardian, Debra Ann King,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Fourth Circuit Court of Appeals has decided in this case that a blind man, driving a car at night, cannot assume the risk of running into a truck across the road in front of him, because he couldn't see that truck. Is that finding so contrary to Virginia Law and so self-contradictory, that this Court should exercise its power of supervision and reverse the Fourth Circuit?

TABLE OF CONTENTS

QUESTION PRESENTED. . . . . (i)

TABLE OF AUTHORITIES . . . . . (iii)
(iv)

OPINION BELOW. 1

JURISDICTION. 2

STATEMENT OF THE CASE 2

ANALYSIS 3

CONCLUSION 7

TABLE OF AUTHORITIES

CASES:

Arrington v. Graham, 203 Va. 310, 314,124 S.E.2nd 199 (1962). 4

Artrip v. E. E. Berry Equipment Company, 240 Va. 354, 397 S.E.2nd 821 (1990) 4

Biggs v. Martin, 210 Va. 630, 634, 172 S.E.2nd 767 (1970). 7

Fein v. Wade, 191 Va. 203, 210, 61 S.E.2nd 29, 32, (1950). 6

Holland v. Shively, 243 Va. 308, 415 S.E.2nd 222 (1992). 4

Landes v. Arhart, 212 Va. 200, 183 S.E.2nd 127 (1971). 4

Mark's Admin. v. Petersburg RR. Company, 88 Va. 1, 13 S.E. 299 (1891). 6

Nelson v. Dayton, 184 Va. 754, 759, 36 S.E.2nd 535 (1946). 6

State of Maryland v. Coard, 175 Va. 571, 583, 9 S.E.2nd (1940). 6

Stoner v. Robertson, 207 Va. 633, 637, 151 S.E.2nd 363 (1966). 4

Vepco v. Winesett, 225 Va. 459, 303 S.E.2nd 868 (1983). 4

Waters v. Safeway Stores, Inc., 246 Va. 269, 435 S.E.2nd 380 (1993) 4

Yeary v. Halbrook, 171 Va. 266, 287, 198, S.E.2nd 441 (1938). 6

UNITED STATES STATUTES:

Title 28, Section 1332 of the United States Code. 2

VIRGINIA STATUTES:

§ 63.1-71 of the 1950 Code of Virginia as amended. 3

§ 63.1-142 of the 1950 Code of Virginia as amended. 3

OTHER AUTHORITIES:

Prosser and Keeton on Torts by F. W. Page Keeton, *et al.*, § 68, at 480-81 (5th Edition, 1984). 5

In The
Supreme Court of the United States

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AARON SMITH TRUCKING COMPANY, INCORPORATED, and WILLIAM IVEY WELLS,
Petitioners,

V.

KENNETH KING, by his Guardian, Debra Ann King,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the Untied States Fourth Circuit Court of Appeals

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Aaron Smith Trucking Company, Incorporated, and William Ivey Wells respectfully petition for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is set out in the Appendix, *infra*, 1a to 12a. That opinion reversed the decision of the U.S. District Court of the Western District of Virginia, Abingdon Division, which is set out in the Appendix, *infra*, 13a to 23a.

JURISDICTION

Respondent (plaintiff) filed this case in the U. S. District Court for the Western District of Virginia, Abingdon Division, as a Diversity of Citizenship matter under Title 28, Section 1332 of the United States Code on February 20, 1992. The respondent was and is a citizen of Virginia. The defendants Aaron Smith Trucking Company, Incorporated, and William Ivey Wells were and are citizens of North Carolina, and the amount in contraversy is in excess of $50,000.

STATEMENT OF THE CASE

Kenneth C. King is and was blind. He was found to be blind as of December 6, 1970, when he was 14 years old. Appendix, *infra,* 28a and J. A. 119. Kenneth C. King was found to be blind for Federal Social Security purposes as of October 7, 1974, when he was 18 years old. Appendix, *infra,* 29a and J. A. 121. Kenneth C. King has been collecting disability from the Social Security Administration on the basis that he was blind ever since then, up to and including the date of this accident. Appendix, *infra,* 30a and J. A. 28 and 31.

Early in the morning of December 10, 1990, while it was still dark, Kenneth C. King drove a car, without swerving, without slowing, and without stopping into and underneath a trailer owned by Aaron Smith Trucking Company, Incorporated, and being pulled by a tractor also owned by Aaron Smith and being driven by William I. Wells. (J. A. 11, 12, 19, 44, 160, and 164). Kenneth C. King's speed was 55 miles per hour. (J. A. 55).

The lights of the tractor trailer were on and met the Federal and State requirements for such lights. Kenneth C.

King's headlights were on. (J. A. 12, 15, 17, 61, 62, 70, 124, 125, 159, 160, and 161).

Kenneth C. King was blind by definition of law at the time the accident occurred. (§ 63.1-71 and § 63.1-142 of the 1950 Code of Virginia as amended - Appendix, *infra*, 24a and 25a and J. A. 178). Dr. William H. Benson, an ophthalmologist, testified that Kenneth C. King could only see clearly that which was about two inches in front of his eyes. (J. A. 203)

Kenneth C. King was, of course, seriously and permanently injured by running the car he was driving under a trailer at 55 miles per hour. (J. A. 19).

ANALYSIS

The Fourth Circuit Court of Appeals has grossly misinterpreted Virginia Law. At page five of the Fourth Circuit's opinion they said that in order for assumption of risk to apply, the plaintiff had to assume the risk of the particular defendant's negligence. Specifically, they said, "Although we can safely assume that King was aware of the risk, if any, that *he* posed to himself or to others, it is Wells negligence for which he hopes to recover. Because King could not have been aware that Wells would have pulled his truck across Route 19 in violation of law, King could not assume *that* risk." Appendix, *infra*, 5a.

The only interpretation which can be made from this finding is that the Fourth Circuit Court of Appeals has held that a blind person driving a car on the highways of Virginia, cannot assume the risk of running into something in front of him, *because he can't see what is in front of him.* The Fourth Circuit Court of Appeals has not cited a single Virginia case for the above holding.

There are Virginia cases directly contrary to that finding. There are a number of cases which have been decided by the Supreme Court of Virginia on the issue of assumption of risk. *None* of those cases suggest that the risk assumed must be "the defendant's," instead the law appears to be as follows:

> Where one voluntarily assumes the risk of injury from a known danger, he is debarred from a recovery in negligence cases.

See *Arrington v. Graham*, 203 Va. 310, 314,124 S.E.2nd 199 (1962); *Stoner v. Robertson*, 207 Va. 633, 637, 151 S.E.2nd 363 (1966). Stated otherwise, assumption of risk connotes venturousness in voluntarily incurring a risk the nature and extent of which is fully appreciated. *See generally, Vepco v. Winesett*, 225 Va. 459, 303 S.E.2nd 868 (1983). Thus assumption of the risk connotes venturousness, and involves analysis as to whether the plaintiff fully understood the nature and extent of a known danger and voluntarily exposed himself to it. *See generally, Waters v. Safeway Stores, Inc.*, 246 Va. 269, 435 S.E.2nd 380 (1993); *Holland v. Shively*, 243 Va. 308, 415 S.E.2nd 222 (1992); *Artrip v. E. E. Berry Equipment Company*, 240 Va. 354, 397 S.E.2nd 821 (1990).

One of the most comprehensive analyses of assumption of risk was dictated in 1937, and recited with approval by the Virginia Supreme Court in 1971 in the case of *Landes v. Arhart*, 212 Va. 200, 183 S.E.2nd 127 (1971). In the *Landes* case, the Court recited the law as follows:

> Where a person has knowledge of and fully appreciates the danger, and under such circumstances, without any special exigency compelling him, he exposes himself to such danger or peril, his act in the premises may be deemed to have been voluntary...freedom of the will, in fact, is the thing emphasized by the principle asserted in the maxim *volenti non fit injuria.*

212 Va. at 203.

The cases cited above, running from 1962 through 1992 in the Supreme Court of Virginia, make it clear that the risk of injury must *merely be from a known danger* in order for the defense of assumption of the risk apply. Plaintiff applied for and received Social Security benefits for being blind. He was blind. There was nothing to dispute the fact that he fully appreciated the nature of his disability. Not only did his handicap serve as a great risk to the general public, but it served as a great risk to himself. There is no doubt that this risk was voluntarily incurred. There was no special exigency compelling the plaintiff to undertake this risk. He voluntarily exposed himself to danger and peril.

The Fourth Circuit Court of Appeals reliance on an out-of-date text which contains not a single reference to a Virginia case, is neither proper nor is it a reliable statement of the state of the law in Virginia. [1] Appendix, *infra*, 5a.

The Fourth Circuit Court of Appeals ruling as to assumption of the risk is internally inconsistent and needs

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[1] *Prosser and Keeton on Torts* by F. W. Page Keeton et al., section 68, at 480-81 (5th Edition, 1984).

correction by this Court. The Fourth Circuit said that Kenneth C. King could not assume the risk of his blindness, because he didn't know what was in front of him. Appendix, *infra*, 5a. If that is so, then his blindness caused him to run into the defendants truck, and had to be a proximate cause of the accident. Thus Kenneth C. King was negligent, and by Virginia law, cannot recover against the defendants. *Yeary v. Halbrook*, 171 Va. 266, 287, 198, S.E.2nd 441 (1938); *Fein v. Wade*, 191 Va. 203, 210, 61 S.E.2nd 29, 32, (1950). Kenneth C. King cannot have it both ways. He cannot argue that his blindness prevented him from perceiving a risk, thereby eliminating the assumption of risk defense, while alternatively arguing that his blindness had nothing to do with the accident.

In Virginia, contributory negligence absolutely bars a plaintiff from any recovery. See *Yeary* and *Fein, supra.*

Driving while legally blind is no different than driving with a windshield encrusted with snow and ice. In *State of Maryland v. Coard*, 175 Va. 571, 583, 9 S.E.2nd (1940), the Court stated the following:

> If her windshield was so encrusted with snow and ice that she could not see, then her failure to clear away that obstruction makes the defendant also liable, for one can no more drive with impunity *when sight is obstructed* than she can without attention as to where she is going.

Similarly, one who drives faster than he should drive into a cloud of dust, in a snowstorm, or in the face of blinding headlights, is required, under the circumstances, in the exercise of ordinary care, to increase his diligence to avoid injury to anyone who may be on the highway in front of him. *See generally, Nelson v. Dayton*, 184 Va.

754, 759, 36 S.E.2nd 535 (1946); *Biggs v. Martin*, 210 Va. 630, 634, 172 S.E.2nd 767 (1970).

In an 1891 case, which has never been overruled, the Virginia Supreme Court positively made a statement which validates our position in this petition. They said in that case that blindness in one eye does not relieve that person from *the duty of ordinary care*, but instead imposes the duty of *greater precautions* to avoid injury. *Mark's Admin. v. Petersburg RR. Company*, 88 Va. 1, 13 S.E. 299 (1891).

We could find no other cases in any of the other Circuit Courts of Appeal saying that a blind person could drive a car at night into an obstacle and make a recovery for that action. We believe the reason no such cases have been found is that no other Circuit in the United States has made such an ill considered and poorly reasoned decision.

CONCLUSION

The Fourth Circuit Court of Appeals ruling in this case is directly opposite to decisions of the Virginia Supreme Court. At the same time those rulings are so inconsistent and so wrong as to require that this Court use its supervisory capacity to correct the Fourth Circuit Court of Appeals. This Court should reinstate the decision of the trial Court (Appendix, *infra*, 13a to 23a) and find in favor of the defendants.

RESPECTFULLY SUBMITTED

AARON SMITH TRUCKING CO.,
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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KENNETH C. KING, by his Guardian, Debra Ann King,
Plaintiff-Appellant,

v.

AARON SMITH TRUCKING COMPANY, INCORPORATED; WILLIAM WELLS,
Defendants-Appellees.

No. 94-1562

Appeal from the United States District Court
for the Western District of Virginia, at Abingdon.
James C. Turk, District Judge.
(CA-92-18-A)

Argued: April 6, 1995

Decided: June 28, 1995

Before WILKINSON and WILKINS, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Affirmed in part, reversed in part, vacated, and remanded for further proceedings by unpublished opinion. Senior Judge Phillips wrote the opinion, in which Judge Wilkinson and Judge Wilkins joined.

COUNSEL

ARGUED: Carnis Eugene Compton, C. EUGENE COMPTON, P.C., Lebanon, Virginia, for Appellant. Nathan Hilles Smith, SMITH & JENSEN, P.C., Richmond, Virginia, for Appellees. **ON BRIEF:**

Eric S. Jensen, SMITH & JENSEN, P.C., Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PHILLIPS, Senior Circuit Judge:

Kenneth King, by his wife and guardian Debra King, appeals from the district court's order granting summary judgment for defendants Aaron Smith Trucking Company and William Ivey Wells in King's diversity suit to recover damages for personal injuries suffered in a motor vehicle accident. King argues that the district court erred in determining that recovery was barred as a matter of law by the doctrines of assumption of risk and contributory negligence. We agree. We do not agree, though, with King's further contention that the district court should have found Wells guilty of willful and wanton negligence as a matter of law and therefore have granted King's own motion for summary judgment on the question of defendants' liability. Accordingly, we affirm the district court's order in part, reverse in part, vacate and remand for further proceedings.

I.

At approximately 6:30 a.m. on December 10, 1990, Wells, a professional truck driver, was pulling a flatbed trailer a few miles north of Abingdon, Virginia for his employer, Aaron Smith Trucking Co. Wells was leaving a parking lot located on the eastern side of Route 19, a four-lane road with a median strip separating the north- and south-bound lanes. Looking to his left, Wells saw that the northbound lanes were clear for a mile but for a single vehicle approximately 950 feet away. A dip in the highway to Wells's right made it impossible for him to tell whether the southbound lanes were clear. Despite the oncoming northbound car, Wells crossed the northbound lanes and

entered the median area in order to turn south toward Abingdon. He waited his cab in the median—with the 48-foot-long trailer completely blocking the two northbound lanes—while awaiting passage of three oncoming southbound vehicles that had been hidden by the dip.

Kenneth King was the driver and sole occupant of the oncoming northbound car. Then thirty-five years old and legally blind for twenty years, King had been licensed by the Commonwealth of Virginia to drive during daylight hours only.[1] It was not daylight when, on the morning of December 10, 1990, King approached Wells's truck. It was dark. Apparently, King did not see the truck.[2] Approximately twelve to thirteen seconds after Wells had pulled across the northbound lanes of Route 19, King's car ran under Wells's trailer. King survived, but his skull was crushed causing him severe brain damage.

In February 1992, King, then a resident of Virginia, filed a diversity action in the United States District Court for the Western District of Virginia against Aaron Smith Trucking Co. and William Wells, both North Carolina residents. He prayed for ten million dollars each in compensatory and punitive damages.

The defendants moved for summary judgment on the independent grounds that King assumed the risk of personal injury by automobile

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[1]Virginia law prohibits the granting of a driver's license to any person whose corrected eyesight does not measure at least 20/40, with the exception that a "license permitting the driving of motor vehicles during a period beginning one-half hour after sunrise and ending one-half hour before sunset, may be issued to a person who demonstrates visual acuity of at least 20/70 in one or both eyes without or with corrective lenses." Va. Code § 46.2-311. King's best corrected visual acuity as measured by standard stationary vision tests was 20/200. King had nonetheless been granted the restricted license thanks to the intervention of his long-time opthamalogist, who had recorded King's functional visual acuity at 20/70 through nonstandard testing procedures.

[2]King himself cannot testify as to whether he saw the trailer for he has no memory of the event. The absence of skid marks at the accident scene suggests that King did not see the trailer before he hit it.

accident and was contributorily negligent by driving in hours of darkness despite his visual disability and in violation of Virginia law. King moved for partial summary judgment on the issue of liability on the grounds that Wells was guilty of willful and wanton negligence, thereby negating the bar of any contributory negligence on his part. King sought judgment imposing liability on defendants, leaving damages to be determined by trial.

Ruling on the parties' cross motions, the court held that there was no genuine issues of material fact and that, as a matter of law, (1) King assumed the risk of injury by driving with full knowledge of his visual disability, (2) King was contributorily negligent per se for driving in violation of law and the conditions of his driver's license, (3) King's contributory negligence was a proximate cause of his injuries, (4) Wells did not act with willful or wanton negligence, and (5) Wells did not have a "last clear chance" to avoid the accident. Accordingly, the district court granted defendants' motion for summary judgment, denied King's motion, and dismissed the complaint.

On appeal, King contends that the district court misconstrued the doctrine of assumption of risk and erred in ruling for the defendants on the issues of proximate causation, willful and wanton negligence, and last clear chance. In particular, King argues that proximate causation and last clear chance were questions properly left for the jury and therefore should not have been decided as a matter of law. In contrast, he argues that the question whether Wells's negligence was willful and wanton was not a jury question, but rather one that the district court should have decided as a matter of law in King's favor. For this reason, King urges that the district court erred not only in granting summary judgment for the defendants but also in denying his own motion for partial summary judgment. We will discuss the district court's rulings on assumption of risk, proximate causation, willful and wanton negligence and last clear chance in turn.

II.

In order to prevail on the affirmative defense of assumption of the risk under controlling Virginia law, a defendant must prove both that the plaintiff fully appreciated the nature and extent of the risk and that the plaintiff incurred the risk voluntarily. *Amusement Slides Corp. v.*

Lehmann, 232 S.E.2d 803, 805 (Va. 1977). The district court noted that "[k]nowledge of the risk involved is essential to its assumption," but found that condition satisfied because "King fully appreciated the nature of his disability." In so reasoning, the court misunderstood the nature of the defense, which is that plaintiff assumed the risk of *defendant's* negligence. *See* Restatement (Second) of Torts § 496A (1965) ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."). Although we can safely assume that King was aware of the risk, if any, that *he* posed to himself or to others, it is Wells's negligence for which he hopes to recover. Because King could not have been aware that Wells would have pulled his truck across route 19 in violation of law, King could not assume *that* risk. *Cf.* W. Page Keeton et al., *Prosser and Keeton on Torts* § 68, at 487-89 (5th ed. 1984) ("Under ordinary circumstances the plaintiff will not be taken to assume the risk of either activities or conditions of which he has no knowledge. . . . And his knowledge of the negligence of one person does not mean that he assumes the risk of negligence of another, of which he does not know."). Since the defendants contend only that King himself breached a duty of care—not that he expressly or impliedly relieved Wells of a duty—assumption of risk was not an available defense on the undisputed facts of record.

III.

Like assumption of risk, under Virginia law, contributory negligence is an absolute bar to recovery in tort. A defendant can make out the defense by proving by a preponderance of the evidence both that the plaintiff was contributorily negligent and that the plaintiff's contributory negligence was a proximate cause of his injuries. *Karim v. Grover*, 369 S.E.2d 185, 186 (Va. 1988). A plaintiff can defeat the defense by showing either that the defendant was guilty of willful and wanton negligence, *Griffin v. Shively*, 315 S.E.2d 210, 213 (Va. 1984), or that the defendant had the last clear chance to avoid the accident. *Pack v. Doe*, 374 S.E.2d 22, 25-26 (Va. 1988). Consequently, defendants were entitled to summary judgment if and only if the record does not raise a genuine issue as to any one of these four material facts: that King was negligent, that his negligence was a factual and legal cause of the accident, that Wells's negligence was not willful and wanton, and that Wells did not have the last clear chance

to avoid the collision. Fed. R. Civ. P. 56(c). We review the district court's grant of summary judgment de novo. *Helm v. Western Maryland Ry. Co.*, 838 F.2d 729, 734 (4th Cir. 1988).

King concedes that he was negligent per se for violating the terms of his driver's license—which is only to say that he owed a duty of care and that he breached that duty. *See, e.g., Thomas v. Settle*, 439 S.E.2d 360, 363 (Va. 1994); *Smith v. New Dixie Lines, Inc.*, 111 S.E.2d 434, 437 (Va. 1959). Although he challenges the district court's conclusions of law regarding willful and wanton negligence and last clear chance, King's principal contention on appeal is that the district court erred in determining as a matter of law that his negligence was a proximate cause of his injuries. For the reasons that follow, we agree.

A.

As do other courts and the commentators, the Virginia Supreme Court has long recognized that proximate causation is, at root and unavoidably, a question of policy and fairness. *See, e.g., Scott v. Simms*, 51 S.E.2d 250, 253 (Va. 1949) ("There is no yardstick by which every case may be measured and fitted into its proper place. In each case the problem is to be solved upon mixed considerations of logic, common sense, justice, policy and precedent."); *see generally Prosser & Keeton on Torts* § 42. For this reason, any particular formulation of the test for proximate causation necessarily will be imperfect. And although Virginia applies an expansive formulation that turns on whether the consequence followed from the negligent act "in natural and continuous sequence," *Beale v. Jones*, 171 S.E.2d 851, 853 (Va. 1970); *see also Norfolk & W. Ry. Co. v. Whitehurst*, 99 S.E. 568, 569 (Va. 1919) ("When once it has been determined that the act is wrongful or negligent, the guilty party is liable for all the consequences which naturally flow therefrom, whether they were reasonably to have been anticipated or not."), it is rare that proximate causation can be decided as a matter of law. For under Virginia law, if reasonable minds could differ regarding whether an accident was a "natural" consequence of a party's negligence—that is, if the dictates of justice, common sense, and precedent, are equivocal—then the question of proximate causation must be left for the jury to decide. *Thomas*, 439 S.E.2d at 363.

B.

King's argument that proximate causation was properly a jury question in this case rests on his claim that he presented sufficient evidence in opposition to defendants' motion for summary judgment from which a factfinder could conclude that a driver with normal vision[3] probably would not have seen Wells's trailer in time to avoid the accident. In particular, King advances two independent reasons in support of his contention that a driver with normal vision in his place would not have avoided this accident.

First, King contends that there is a genuine issue regarding whether a person of normal vision would have seen the trailer lights. There were only three small amber lights visible to someone coming perpendicular to the truck—one at the rear, one at the front, and one at the middle. A yellow line had been painted along the length of the trailer but the evidence (taken in the light most favorable to King) revealed that the trailer had no reflective material.[4] The state trooper who responded to the scene of the accident testified that "they were small lights. At that time of the morning, I don't know if you could have s[een] them or not."

Second, and more significantly, King urges that the lights, even if visible, did not adequately convey the presence of a road hazard. In his opposition to summary judgment, King presented the affidavits of two experts in traffic safety and "human factors" engineering to support his contention that a driver with normal vision who did see the trailer's lights would have been unable to discern the character or location of the object to which they were attached. As one expert, Dr. Harry L. Snyder, professor emeritus of human factors engineering at Virginia Polytecnnic Institute explained based on his published research into the causes of underride accidents,

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[3]We use the term "normal vision" to mean the minimal degree of visual acuity with which a person could drive at night without breaching a duty of care to other users of the roads.

[4]Although the district court observed that the trailer did have reflective tape, the record on summary judgment contained evidence to the contrary. Moreover, at oral argument, defendants did not dispute King's assertion that the trailer had neither reflective tape nor reflective paint.

> it is very nearly impossible for the human eye to distinguish depth, or distance to the lights, in circumstances such as those surrounding this accident. What Mr. King would have seen, assuming the trailer's lights were on, was one [yellow] light at the right edge of the road, i.e., the rear trailer light, one yellow light at the left side of the road, i.e., the front trailer light, and one yellow light in the middle of the road. Because the trailer was a flat-bed, Mr. King, or any driver approaching this trailer stretching across his two lanes of travel, would have been able to see below and above the trailer to the road or other traffic beyond. These confused reference points when coupled with a single middle light offered no basis for depth perception. In other words, a driver's eyes could not discern whether this light was a large yellow light a long distance away or a small yellow light very close.

Dr. Snyder concluded "[t]hat the vision problems which Mr. King had did not cause or contribute to this accident because, in my opinion, it is probable that no driver would have seen this trailer prior to hitting it."

C.

We agree with King that the evidence as forecast on the summary judgment record would have permitted (though not required) a jury to find that even a driver with normal vision probably would have failed to see the trailer—or, put otherwise, that King himself would not have seen the trailer even if he had had normal vision.[8] Such a

[8]In concluding that King had failed to create a genuine issue concerning causation, the district court ruled that much of Dr. Snyder's anticipated testimony would be inadmissible at trial. The court explained that Dr. Snyder's conclusion would be "overly prejudicial" and thus inadmissible under Fed. R. Evid. 403, and that his "opinions would not assist the trier of fact to understand the evidence as they rely more upon common sense than scientific inquiry and should not be considered." Of course, these evidentiary rulings are not final and King does not challenge them on appeal. Accordingly, we need not decide whether the body of King's experts' testimony tending to establish that Wells's trailer would proba-

finding would entail that King's accident did not "naturally flow" from his negligence; that, instead, the accident occurred not because King could not see the trailer but because it could not be seen. For this reason, whether King's negligence in driving with impaired vision and in violation of law was the proximate cause of the accident and his injuries presented a genuine issue of material fact making summary judgment improper. It is for a jury, properly instructed on Virginia law, to inquire into the difficult questions of the likelihood that a driver with normal vision in King's place would have avoided the accident, and the degree to which King's disability increased the risk relative to the average driver.

IV.

As a general matter, willful and wanton negligence "differs from negligence not only in degree but in kind, and in the social condemnation attached to it." *Prosser & Keeton on Torts* § 65, at 462. In Virginia, "[w]illful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another." *Griffin*, *supra*, 315 S.E.2d at 213; *see also Wolfe v. Baube*, 403 S.E.2d 338, 340 & n.4 (Va. 1991) (defining "gross negligence" as "an utter disregard of prudence amounting to a complete neglect of the safety of [another] . . . . as would shock fair minded men" and observing that "[w]illful and wanton negligence is greater in degree than gross negligence") (quotation omitted). The defendants were entitled to summary judgment only if Wells's negligence was not willful and wanton as a matter of law. King was entitled to partial summary judgment on the question of liability if Wells's negligence was willful and wanton, so long as his own negligence was not likewise willful and wanton. *Griffin*, 315

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bly not have been seen by any oncoming driver would be admissible under Fed. R. Evid. 702. *See generally Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054-55 (4th Cir. 1986). We note, though, that the district court's view that such expert opinions would be inadmissible on the grounds that they reflect only "common sense" bolsters King's argument that there existed a genuine issue regarding proximate causation.

S.E.2d at 213. The district court ruled that a reasonable jury could not find that Wells's negligence was willful and wanton and therefore did not assess the particular degree of King's own negligence.

It is uncontroverted that Wells, like King, was negligent per se. By driving his truck across the northbound lanes of Route 19 where and when he did, Wells violated his statutory duties to yield to all incoming traffic, Va. Code § 46.2-826, and not to "stop a vehicle in such manner as to impede or render dangerous the use of the highway by others." Va. Code § 46.2-888. Although Wells conceded that he knew the rules of the road, there is no mystery regarding why he violated them: he expected that the driver of the oncoming car would see the trailer and stop in time in the event that he (Wells) was forced to pause in the median. Though tragically mistaken, the expectation was not so lacking in reason as to constitute "willful and wanton" negligence. We agree with the district court's conclusion that no reasonable jury could find that Wells's conduct reflected a "reckless indifference" that would "shock fair minded" persons. The district court did not err in ruling that, as a matter of law, Wells was not guilty of willful and wanton negligence.

V.

Like the concept of willful and wanton negligence, the doctrine of "last clear chance" provides plaintiffs a means to negate the defense of contributory negligence. It applies in either of two situations: "[w]here the injured person has negligently placed himself in a situation of peril from which he is physically unable to remove himself"—the "helpless plaintiff"; and "[w]here the plaintiff has negligently placed himself in a situation of peril from which he is physically able to remove himself, but is unconscious of his peril"—the "inattentive plaintiff." *Greear v. Noland Co.*, 89 S.E.2d 49, 53 (Va. 1955).

To invoke the doctrine on either basis, a plaintiff must of necessity conditionally concede his own negligence as a potential contributing cause of his injuries, and King does that here. We agree with the district court that on the summary judgment record, he failed as a matter of law to establish either basis. An essential element of the doctrine, whatever the basis relied upon, is that "the defendant realized or

ought to have realized the plaintiff's peril in time to avert the accident by use of reasonable care." *Park, supra*, 374 S.E.2d at 25.

The district court ruled that as a matter of law on the undisputed facts, this element could not be found in King's favor.

> While Wells saw King's vehicle approaching, he could have reasonably expected that King would see his trailer and slow down to avoid it. By the time Wells realized that King was not going to stop it was too late for him to back his truck across the intersection and avoid the collision.

We think the district court's ruling is fully supported by common sense as well as by Wells's uncontradicted deposition testimony. Wells explained that when he looked over his left shoulder the third time, he realized that King

> was getting too close. I said, "Well, ain't he gonna stop?" Then I looked back at the other [southbound] car because I was getting ready to go. I mean, it was getting too close for me to be sitting there. Or I was hoping I could get out of the way because a whole lot of people don't slow up until they get right up on you because they know . . . you're going to be moving out the way, and they just dodge around you.
>
> Well, I looked back the fourth time and I didn't never get to the window. I just got to the mirror and I saw the headlights. Then the next thing I know it sounded like a big piece of glass like if you had dropped it on the highway.

Just when Wells should have realized that King was not going to slow down—and therefore that King must be unaware of the trailer's presence—is entirely speculative. While it is conceivable that, at that moment, Wells could have avoided the accident by shifting into reverse and backing the trailer off the highway into the parking lot, that possibility is manifestly remote indeed.

The Virginia Supreme Court has emphasized that "[a] plaintiff cannot recover under the doctrine of last clear chance on 'a mere perad-

venture.'" *Id.* (quoting *Smith v. Spradlin*, 132 S.E.2d 455, 457 (Va. 1963)); *see also Anderson v. Payne*, 54 S.E.2d 82, 85 (Va. 1949). "As the name of the doctrine implies, the defendant's chance must be . . . a clear chance in order for there to be recovery under it." *Smith*, 132 S.E.2d at 457. Because a reasonable jury could not find by a preponderance of the evidence that Wells had a clear chance to avert the accident by the time he realized or should have realized that King was unaware of Wells's trailer, the district court properly ruled that, as a matter of law, King could not defeat the defense of contributory negligence by reliance on the doctrine of last clear chance.

VI.

We therefore affirm the district court's rulings that, as a matter of law, Wells' negligence was not willful and wanton and Wells did not have the "last clear chance" to avoid the accident. We reverse the rulings that, as a matter of law, King's recovery is barred by the doctrine of assumption of risk and King's contributory negligence was the proximate cause of the accident. On this basis, we affirm the court's denial of King's motion for partial summary judgment, vacate the court's grant of summary judgment for defendants, and remand for further proceedings. On remand, the district court's rulings that, as a matter of law, Wells's negligence was not "willful and wanton" and Wells did not have the "last clear chance" stand as law of the case; whether King's *per se* contributory negligence was a proximate cause of the accident is, on the present record, a genuine issue of material fact.

SO ORDERED

ENTERED: 3/27/94

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

KENNETH C. KING, BY HIS GUARDIAN DEBRA ANN KING,	)	
Plaintiff,	)	**Civil Action No. 92-0018-A**
v.	)	
	)	**FINAL ORDER**
AARON SMITH TRUCKING CO., INC. AND WILLIAM I. WELLS,	)	
Defendants.	)	

By: Hon. James C. Turk
United States District Judge

In accordance with the written Memorandum Opinion entered this day it is **ADJUDGED AND ORDERED** that defendants' motion for summary judgment is **GRANTED** and plaintiff's motion for summary judgment is **DENIED.**

The Clerk is directed to strike this case from the active docket of the court and to send certified copies of

this Order and accompanying Memorandum Opinion to all counsel of record.

ENTER: This 28th day of March, 1994.

/S/ James C. Turk
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

KENNETH C. KING, by his Guardian, Debra Ann King,	)	
Plaintiff,	)	**Civil Action No. 92-0018-A**
v.	)	
AARON SMITH TRUCKING CO., INC. and WILLIAM I. WELLS,	)	**MEMORANDUM OPINION**
Defendants.	)	

By: Hon. James C. Turk
United States District Judge

Kenneth C. King, through his guardian and wife, Debra Ann King, brought this action against Aaron Smith Trucking Company, Inc. and William I. Wells, to recover damages for personal injuries suffered in a motor vehicle accident that occurred in Washington County, Virginia on December 10, 1990. The court has diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332. This action is presently before the court on cross motions for summary judgment.

I.

At approximately 6:30 a.m. on December 10, 1990, William Wells was driving a flat bed truck a few miles north of Abingdon, Virginia, for his employer Aaron Smith Trucking Co. Wells was leaving the parking lot of Builder's Supermarket, located on the eastern side of Route 19. Route 19 is a four-lane road with a median strip separating the north and southbound lanes. Despite seeing an oncoming northbound vehicle, Wells crossed the two northbound lanes and entered the median area in order to turn south toward Abingdon. He waited with his cab in the median and the trailer blocking the two northbound lanes for the passage of three oncoming southbound cars that he did not see until he arrived at the median. Wells had a statutory duty to yield to all oncoming traffic[2] and not to stop his vehicle on the road.[3] Plaintiff's vehicle, driving north on Route 19, collided with the trailer causing severe injuries to the plaintiff.

Kenneth King is legally blind. His best corrected visual acuity is 20/200– ten times worse than normal (20/20) vision–and his uncorrected vision is 20/400. He suffers from the congenital conditions of myopia (nearsightedness), esotropia (inward deviation of the eyes), a pendular nystagmus (involuntary movement of the eyes from side to side) and bilateral amblyopia (inability to focus on a single small object for long periods of time). In 1974 plaintiff applied and qualified for Supplemental Security Income benefits claiming he

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[2]Va. Code § 46.2-826.

[3]Va. Code § 46.2-888.

was "blind." His corrected vision of 20/200 renders him statutorily ineligible to drive on Virginia's roads at any time.[4] However, his opthamologist, Dr. F. Ellison Conrad, helped him to secure a daylight driving only driver's license despite his poor vision.[5] Plaintiff was not licensed to drive in the pre-dawn hours on December 10, 1990 when the accident occurred.

Defendants claim that plaintiff either assumed the risk of his injuries or was contributorily negligent by driving at night with his poor vision and therefore cannot recover for his injuries. Plaintiff denies these defenses and claims that in any event the defenses are inapplicable because defendants are guilty of wanton or willful conduct; alternatively, plaintiff argues that if he was guilty of contributory negligence he may still recover under the doctrine of last clear chance.

II. Assumption of Risk

Defendants argue that even if Wells was negligent, plaintiff assumed the risk of this collision and was contributorily negligent by driving at night while nearly blind and therefore may not recover under Virginia law. Assumption of the Risk and contributory negligence are related but distinct doctrines. While contributory negligence connotes carelessness, assumption of the risk describes venturousness in voluntarily incurring a risk the nature and extent of

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[4]Va. Code § 46.2-311.

[5]Dr. Conrad claims that by moving the eye chart plaintiff was able to achieve 20/70 "dynamic" visual acuity, and thus qualify for a daylight driving only permit. Dr. Conrad can provide no sound scientific basis for his dynamic test.

which are fully appreciated. *Virginia Elec. & Power Co. v. Winesett*, 303 S.E.2nd 868, 875 (Va. 1983); *Arrington v. Graham*, 124 S.E.2nd 199, 202 (Va. 1962). In order to prevail on a defense of assumption of the risk, defendants must prove two elements: (1) that plaintiff fully appreciated the nature and extent of the risk; and (2) that the risk must be voluntarily incurred. *Amusement Slides Corp. v. Lehmann*, 232 S.E.2nd 803, 805 (Va. 1977). Knowledge of the risk involved is essential to its assumption. *Id.* In *Arrington v. Graham*, plaintiff voluntarily got into an automobile and rode with a driver he knew to be drunk, and subsequently was injured when the car collided with a bridge. In reversing a jury's verdict for plaintiff, the Virginia Supreme Court said, "Graham got in the car with his eyes and ears wide open to the dangers and risks threatened. It is difficult to conceive of stronger warnings of danger. He must be held to have accepted the risk and the consequences. He was not merely careless; but was venturesome in accepting the obvious risk." 124 S.E.2nd at 202.

King applied for and received SSI benefits for being "blind." He was listed as legally blind by the Virginia Commission for the Visually Handicapped since 1970. His driver's license allowed him to drive in daylight hours only. It is clear that King fully appreciated the nature of his disability. Driving at night with severely restricted visual acuity is a great risk to oneself and to the general public; if plaintiff's common sense was lacking then the restriction on his driver's license served to give him notice of the risk. It is also clear that plaintiff voluntarily incurred this risk; he would have only needed to wait for dawn in order to drive legally. Therefore, the court finds as a matter of

law that plaintiff assumed the risk of running into a vehicle when he drove in the predawn hours of December 10, 1990. *See High v. Coleman*, 205 S.E.2nd 408, (Va. 1974) (appropriate to find assumption of risk as a matter of law when danger is open and obvious and plaintiff was bound to have appreciated the hazard which was voluntarily assumed).

III. Contributory Negligence

Defendants also argue that plaintiff was contributorily negligent and this negligence was a proximate cause of his injuries. It was negligent *per se* for plaintiff to drive at night.[6] In order for defendants to show proximate causation it is not necessary for defendants to show that *but for* plaintiff's negligence the accident would not have occurred; defendants need only show that the plaintiff's negligence contributed to his injuries. For example, if King had been struck from the rear by a vehicle, there would be no proximate cause to link plaintiff's defective vision to his injuries. Here, however, plaintiff drove into a stopped trailer at a high rate of speed. The trailer was parked across the

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[6]A person is guilty of negligence *per se* when he violates a statute, and the victim is a member of the class which the statute is designed to protect. *Butler v. Frieden*, 158 S.E.2nd 121, 122(Va. 1967). Plaintiff violated both Va. Code § 46.2-311 (setting 20/40 as the minimum corrected vision in order to qualify to drive at night) and the restriction on his license. Both of these restrictions were clearly enacted to protect the public from drivers who cannot see where they are going.

road with its lights on.[7] The road was straight and Wells saw plaintiff's vehicle from approximately 910 feet away. There is no evidence that plaintiff *ever* saw the trailer before the collision. There were no brake or skid marks on the roadway. Stephen Chewning, plaintiff's traffic safety expert, opined that "the fact that there were no skid marks present at the time of the crash indicates that the reaction to the braking phase had never been completed by Mr. King." In other words, if plaintiff did see the trailer, it was too late for him to react.[8] Plaintiff also submits the affidavit of Harry Snyder, a "human factors" expert. Dr. Snyder asserts that a driver with normal vision would have been unable to determine that the lights were on a vehicle or how far away they were.[9] Dr. Snyder's opinions would not assist the trier of fact to understand the evidence as they rely more upon common sense than scientific inquiry and should not be considered. *See Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054-55 (4th Cir. 1986) ("evaluation of the commonplace by an expert witness might supplant a jury's independent

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[7]Because the collision destroyed the trailer's center light, there is no evidence as to whether this light was functioning. There were sufficient other lights and reflective tape, however, for the truck to have been visible.

[8]Contrary to plaintiff's claim, Mr. Chewning does not conclude that a person with perfect vision would have had difficulty seeing the trailer *in time to avoid the accident*; Mr. Chewning only indicates that the trailer would have been difficult to observe under the conditions prevailing at the time of the crash.

[9]Dr. Snyder also speculates that "it is probable that no driver would have seen this trailer prior to hitting it." This statement is overly prejudicial and inadmissible pursuant to Fed. R. Evid. 403.

exercise of common sense"). Consequently, the court finds that plaintiff's negligence was a proximate cause of his injuries as a matter of law.[10]

IV. Willful and Wanton Negligence

Contributory negligence is not available as a defense where the defendant has acted with willful or wanton negligence, unless plaintiff's contributory negligence was also willful or wanton. *Griffen v. Shively*, 315 S.E.2nd 210, 213 (Va. 1984).[11] Willful and wanton negligence is acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another. *Id.* Plaintiff argues that defendant is guilty of willful and wanton negligence as a matter of law because he knew that Virginia law requires him to

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[10]Even if the plaintiff has presented a factual dispute as to proximate cause, this issue is not necessary to the finding that plaintiff assumed the risk of his injury, so long as there is some connection between plaintiff's conduct and his exposure to danger. *See* 82 A.L.R.2nd 1218, 1232 § 5 ("One distinction between assumption of the risk and contributory negligence is that contributory negligence is itself a proximate cause of the injury complained of, while assumption of the risk will bar a recovery even though it plays no part in causation of the accident except the voluntary exposure to danger with actual knowledge of the dangerous condition.")

[11]Assumption of risk, however, is a not barred by willful or wanton negligence. *See* W. Page Keeton, ed., *Prosser and Keeton on Torts*, (5th ed., 1984) at 495 §68 ("The plaintiff may assume the risk where the conduct of the defendant is willful, wanton or reckless...") (citing cases).

yield to approaching vehicles and not to stop on the road, yet he nonetheless pulled onto the road in front of plaintiff and then stopped his trailer on the road. The court disagrees; just as one who exceeds the posted speed limit may do so knowingly, this does not indicate that one acts in conscious disregard of another's rights or reckless indifference to the consequences, nor does it demonstrate awareness that his conduct would probably cause injury. While violation of a statute creates actionable negligence where the victim is a member of the class which the statute sought to protect, *Butler*, 158 S.E.2nd at 122, there has been no evidence that defendant's negligence was more than ordinary, *i.e.* that he was reckless in expecting that his truck would clear the northbound lanes prior to the arrival of plaintiff's vehicle. Therefore, the court finds as a matter of law that Wells did not act with willful or wanton negligence when he caused his truck to block Route 19.

V. Last Clear Chance

Finally, plaintiff argues that the doctrine of last clear chance is applicable.[12] Under the doctrine of last clear chance, if King was physically unable to remove himself from this peril, Wells saw King and realized or should have realized his peril in time to avert the accident, then defendant will be liable despite plaintiff's

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[12]Again, however, last clear chance does not avoid assumption of the risk. *See* W. Page Keeton, ed., *Prosser and Keeton on Torts*, (5th ed., 1984) at 495 §68 ("It also appears that assumption of risk may be a good defense where the defendant has the last clear chance.") (citing cases).

contributory negligence.[13] *Pack*, 374 S.E.2nd at 25. While Wells saw King's vehicle approaching, he could have reasonably expected that King would see his trailer and slow down to avoid it. By the time Wells realized that King was not going to stop it was too late for him to back his truck across the intersection and avoid the collision. Therefore, the court finds as a matter of law that the last clear chance doctrine is inapplicable in this situation.

VI. Conclusion

In conclusion, it is inescapable that plaintiff should not have been driving at night while legally blind. By this voluntary and knowing act of venturousness he assumed the risk that he would be injured if he collided with a vehicle he did not see. Further, plaintiff's negligence in driving at night was a proximate cause of his injury. While defendant was probably negligent in allowing his trailer to block the road there is no evidence that his negligence was willful or wanton. Finally, the doctrine of last clear chance is inapplicable where, as here, Wells could not reasonably have known that plaintiff would not see his trailer until it was too late for him to avoid the collision. Therefore,

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[13]Plaintiff claims that he was an "inattentive plaintiff," in that he negligently placed himself in a position of peril from which he physically is able to remove himself but was unconscious of his peril *Greear v. Noland Co.*, 89 S.E.2nd 49, 53 (Va. 1955). The physical incapacity contemplated in the "helpless plaintiff" situation must be a condition result from non-negligent, non-intentional natural causes, such as a seizure, cerebral accident or hearth attack. *Pack v. Doe*, 374 S.E.2nd 22, 26 (Va. 1988). Plaintiff's condition does not qualify him as a "helpless plaintiff."

summary judgment will be granted to defendants. An appropriate order will be entered this day.

ENTER: This 28th day of March, 1994.

/S/ James C. Turk
UNITED STATES DISTRICT JUDGE

§ 63.1-142 of the 1950 Code of Virginia, as amended, as of 1970, provides in relevant part:

§ 63.1-142. Definitions.--The following terms whenever used in this article, shall have the meanings respectively set forth unless a different meaning is clearly required by the context:

(b) "*Blind person*" means a person having not more than 20/200 visual acuity in the better eye with correcting lenses; or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of visual field subtends an angle no greater than twenty degrees. Such blindness shall be certified by a duly licensed ophthalmologist.

§ 63.1-71 of the 1950 Code of Virginia, as amended, as of 1970, provides in relevant part:–
§ 63.1-71. Register of the blind; reports required of physicians and others--The Commission shall prepare and maintain a complete register of the blind in the State, which shall describe the condition, cause of blindness, capacity for educational and industrial training of each, and such other facts as the Commission deems of value. Each physician, optometrist or other person who upon examination of the eyes of any person determines that such person is a blind person as defined in § 63.1-142, shall immediately report the name and address of such person to the Commission.

USCA 42 § 1382c. Provides in relevant part:

...(2) An individual shall be considered to be blind for purposes of this subchapter if he has central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of the first sentence of this subsection as having a central visual acuity of 20/200 or less. An individual shall also be considered to be blind for purposes of this subchapter if he is blind as defined under a State plan approved under subchapter X or XVI of this chapter as in effect for October 1972 and received aid under such plan (on the basis of blindness) for December 1973, so long as he is continuously blind as so defined.

46.2-311 of the 1950 Code of Virginia, as amended, as of 1989, provides in relevant part:

46.2-311. Persons having defective vision; minimum standards of visual acuity and field of vision; tests of vision.

A. The Department shall not issue a driver's license or learner's permit (i) to any person unless he demonstrates a visual acuity of at least 20/40 in one or both eyes with or without corrective lenses or (ii) to any such person unless he demonstrates at least a field or 100 degrees of horizontal vision in one or both eyes. However, a license permitting the driving of motor vehicles during a period beginning one-half hour after sunrise and ending one-half hour before sunset, may be issued to a person who demonstrates a visual acuity of at least 20/70 in one or both eyes without or with corrective lenses provided he demonstrates at least a field of seventy degrees of horizontal vision, and further provided that if such person has vision in one eye only, he demonstrates at least a field of forty degrees temporal and thirty degrees nasal horizontal vision.

REQUESTS FOR ADMISSION

Pursuant to Federal Rule of Civil Procedure 36, the Defendants request the Plaintiff to admit the following within thirty (30) days of service of this request:

1. The attached Virginia Commission for the Visually Handicapped report of eye examination dated December 6, 1970, and certified by Dr. J. D. Tuck, an ophthalmologist from Roanoke, Virginia, (Attachment No. 1) (J. A. 119) is authentic. (J. A. 114).

1. ANSWER: Admitted. However, the information contained in Request #1 is not within the scope of discovery under Rule 26(b) as it is not relevant to the subject matter involved in the pending action. (J. A. 151).

REQUESTS FOR ADMISSION

Pursuant to Federal Rule of Civil Procedure 36, the Defendants request the Plaintiff to admit the following within thirty (30) days of service of this request:

11. The attached Disability Determination and Transmittal of the Social Security Administration, dated October 7, 1974, (Attachment No. 5) (J. A. 121) is authentic and determines Kenneth King to be "blind" under the appropriate section of the United States Code. (J. A. 116).

11. ANSWER: Admitted. However, the information contained in Request #11 is not within the scope of discovery under Rule 26(b) as it is not relevant to the subject matter involved in the pending action. (J. A. 153 and 154).

REQUESTS FOR ADMISSION

Pursuant to Federal Rule of Civil Procedure 36, the Defendants request the Plaintiff to admit the following within thirty (30) days of service of this request:

23. Kenneth King retained the designation of being "legally blind" with the Virginia Department for the Visually Handicapped from the date of this designation in 1970 up to the date of the accident which is the subject of this case, December 10, 1990, and this designation did not change at any time during this period. (J. A. 117).

23. ANSWER: Admitted. However, the information contained in Request #23 is not within the scope of discovery under Rule 26(b) as it is not relevant to the subject matter involved in the pending action. (J. A. 155).